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No. 84-2013

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DUQUESNE LIGHT COMPANY *et al.*,
Petitioners,

v.

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT TRUSTEES OF THE UMWA HEALTH AND RETIREMENT FUNDS

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QUESTION PRESENTED

Whether the Court of Appeals properly held that the legality of the "purchase-of-coal clause" of the National Bituminous Coal Wage Agreements of 1974, 1978 and 1981, under § 8(e) of the National Labor Relations Act, could not be determined on summary judgment where no inquiry had been conducted into the purpose of the clause or the manner in which it had been applied.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. The Purchase-of-Coal Clause Litigation	2
B. The Positions of the Parties	3
C. The Status of the Proceedings	5
D. The Opinion Below	6
REASONS FOR DENYING THE WRIT	7
I. INTRODUCTION AND SUMMARY	7
II. THE OPINION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS AND RAISES NO UNSETTLED ISSUES OF NATIONAL LABOR POLICY	8
III. SINCE THE THIRD CIRCUIT DID NOT RULE UPON THE LEGALITY OF THE CLAUSE, REVIEW OF ITS DECISION IS NOT WARRANTED	14
CONCLUSION	16

TABLE OF AUTHORITIES

Cases Page

A. Duie Pyle, Inc. v. *NLRB*, 383 F.2d 772 (3d Cir. 1967), *cert. denied*, 390 U.S. 905 (1968) 11
Amax Coal Co. v. *NLRB*, 614 F.2d 872 (3d Cir. 1980), *rev'd on other grounds*, 453 U.S. 322 (1981) 12
Carrier Air Conditioning Co. v. *NLRB*, 547 F.2d 1178 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977) 11
Frito-Lay, Inc. v. *Retail Clerks Union Local No. 7*, 629 F.2d 653 (10th Cir. 1980) 11
General Longshore Workers, ILA Local No. 1418 (New Orleans Steamship Ass'n), 235 N.L.R.B. 161 (1978) 12
Kaiser Steel Corp. v. *Mullins*, 455 U.S. 72 (1982) 2, 5, 15
Local Union 6046 UMWA (Plateau Coal Sales, Inc.), N.L.R.B. Cas. No. 9-CC-1161-1-2-3 (Filed Feb. 4, 1982) 15
National Woodwork Manufacturers Ass'n v. *NLRB*, 386 U.S. 612 (1967) ..... *passim*
NLRB v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951) 11
NLRB v. *International Longshoremen's Ass'n*, 53 U.S.L.W. 4919 (U.S. June 27, 1985) (*"ILA"*) ....*passim*
Pacific Northwest Chapter of Associated Builders & Contractors, Inc. v. *NLRB*, 654 F.2d 1301 (9th Cir. 1981), *aff'd in part sub nom. Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645 (1982) 12
Sheet Metal Workers International Association v. *NLRB*, 498 F.2d 687 (D.C. Cir. 1974) 11

Statutes

Sherman Act:
15 U.S.C. § 1 (1982) 3
Judiciary and Judicial Procedure Act:
28 U.S.C. § 1407(a) (1982) 5
National Labor Relations Act as amended:
29 U.S.C. § 158(b)(4) (1982) 10
29 U.S.C. § 158(e) (1982) 2

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BRIEF IN OPPOSITION FOR RESPONDENT TRUSTEES OF THE UMWA HEALTH AND RETIREMENT FUNDS

STATEMENT OF THE CASE

This case arises out of the efforts of the respondents, Trustees of the United Mine Workers of America Health and Retirement Funds ("Trustees"), to collect contributions due to the Funds under what is known as the "purchase-of-coal" clause of the National Bituminous Coal Wage Agreements of 1974, 1978 and 1981 ("Agreements" or "NBCWA"). Petitioners, certain coal operators who are signatory to these Agreements, have resisted payment on the ground that the clause, on its face, has a secondary purpose in violation of § 8(e) of the National Labor Re-

lations Act ("NLRA"), 29 U.S.C. § 158(e).[1] The operators moved for summary judgment that the clause was *per se* unlawful and their motion was granted by the District Court. App. 50a.[2] The Court of Appeals for the Third Circuit reversed, holding that "the prohibited secondary objective is not revealed by the language of the collective bargaining agreement here, and further inquiry is necessary." App. 12a. Accordingly, the Third Circuit remanded the case to the District Court for fact finding consistent with the guidelines set forth in the opinion. App. 17a.[3] The coal operators are now petitioning this Court to review the Third Circuit's order vacating summary judgment.

A. The Purchase-of-Coal Clause Litigation

The coal operators' petition, as they note, Pet. 3, grows out of litigation that has previously been before this Court. *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982). The Trustees have filed lawsuits against coal operators, including petitioners here, to collect certain contributions due to the Funds under the National Bituminous Coal Wage Agreements of 1974, 1978 and 1981. These Agreements require each signatory company to make contribu-

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[1] The signatory operators are not of one mind on this issue. The Bituminous Coal Operators' Association, Inc., the national bargaining representative that negotiated the three Agreements containing the clause at issue, filed a brief amicus curiae in the Court of Appeals supporting the clause's legality under § 8(e) and arguing for reversal of the District Court's summary judgment holding to the contrary.

[2] References to the Appendix filed with the petition ("Pet.") will be cited as "App. ——"; references to the Joint Appendix filed in the Court of Appeals will be cited as "J.A. ——."

[3] The Third Circuit denied petitions for rehearing en banc on April 1, 1985. App. 52a-57a. By order of April 17, 1985, the Court of Appeals stayed its mandate until June 30, 1985, or, with the timely filing of a petition for certiorari, final disposition by this Court.

tions to the Funds based upon the coal it produces, measured by the employee hours worked and the tonnage of coal mined. J.A. 862, 902, 231-32. The Agreements further require signatory companies to make an approximately equivalent contribution to the Funds based upon the tonnage of coal purchased as to which no contribution has previously been made. J.A. 862, 902-03, 232; App. 3a, 4a, 12a. This latter provision is the "purchase-of-coal clause" and is the subject of these lawsuits.[4]

B. The Positions of the Parties

The operators maintain in this litigation that they are not obligated to make contributions under the purchase-of-coal clause because the clause is a union signatory clause violative of § 8(e) of the NLRA.[5] They argue that the purchase-of-coal contribution, in effect, applies only to purchases from companies which are not signatory to a contract with the International Union, United Mine Workers of America ("UMWA"). Consequently, the operators contend, the clause puts secondary pressure on non-signatories to recognize the UMWA.

The Trustees and the UMWA argue that the clause is neutral on its face and does not have a secondary purpose or effect. Rather, the Trustees and the UMWA contend, there is a significant differential in labor costs between signatory and nonsignatory operators—a differ-

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[4] The Court of Appeals described the interplay between the two clauses as follows: "When read in conjunction with the 'produced-coal clause', the effect [of the purchase-of-coal clause] is to require an employer-signatory to pay an identical contribution to the Health and Retirement Funds whether the coal was extracted from the employer's mines or was bought from an operator that had not already paid the contribution on the assessed tonnage." App. 4a (footnote omitted).

[5] Certain operators have also argued that the purchase-of-coal clause violates Section 1 of the Sherman Act, 15 U.S.C. § 1. The Third Circuit did not rule upon this contention, App. 3a, 12a, and petitioners do not raise the issue here.

ential attributable to the more comprehensive and costly wage and benefit package of miners covered by the Agreements—and this differential provides signatory companies with an incentive to purchase coal rather than produce it themselves.[6] The UMWA designed the purchase-of-coal clause to eliminate this incentive by equalizing

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[6] The evidence already in the record shows a long-existing differential between the labor costs of signatory and nonsignatory companies. Thus, for example, studies performed by the Bureau of Labor Statistics of the United States Department of Labor ("BLS") over a ten-year time span disclose the existence of a significant differential between NBCWA and non-NBCWA labor costs. In 1971, BLS published data comparing the compensation—including health and retirement benefits—of UMWA miners covered by the NBCWA with the compensation provided to non-UMWA miners. J.A. 1409-16. This survey showed that total compensation—including pay for vacations, holidays, and other leave, as well as health, retirement, and other insurance programs—for UMWA miners covered by the NBCWA was almost double that of non-UMWA miners. J.A. 1411. This disparity resulted in large measure from the higher costs incurred by signatory companies in providing health and retirement benefits to their mining employees. J.A. 1412. The BLS conducted a subsequent survey for the period January 1976 through March 1981. J.A. 1336-99. This survey shows that the differential in the benefits, and hence the labor costs, of signatory and nonsignatory operators continued to exist throughout the period of the purchase-of-coal clauses at issue in these cases. *See, e.g.*, J.A. 1363, 1364, 1366, 1373, 1386.

Moreover, these studies, when considered with other evidence in the record, suggest that not only is there a differential in labor costs that exists generally in the industry, but that there is in fact no nonsignatory company that has labor costs comparable to those of signatory companies. As explained in an affidavit of Donald E. Pierce, Jr., consulting economist to the UMWA, even if a nonsignatory company offered its employees health and retirement benefits comparable to those provided by signatory companies, the cost of the multiemployer health and pension benefits provided by the signatory companies would far exceed the costs incurred by nonsignatories. This is because the NBCWA operators, unlike nonsignatory employers, are required to provide health and retirement benefits to a relatively large number of retired employees who are no longer helping to generate income to pay the benefits. J.A. 933, 998-1001.

the labor cost component of the price of coal. By structuring the clause in this way, the Trustees and the UMWA contend, the parties to the National Agreements devised a valid "union standards" clause that protects the work of the miners of each signatory employer from the threat created by the lower labor costs of nonsignatory mines. The clause was not intended to further the UMWA's organizational efforts and had no such effect. Thus, the Trustees and the UMWA contend the purchase-of-coal clause will be shown on a full record to be lawful under 8(e).

C. The Status of the Proceedings

In the first stage of the proceedings, the Trustees argued that the illegality defense was not available to the delinquent operators in these collection actions. In *Kaiser Steel Corp.* v. *Mullins*, *supra*, this Court rejected that argument, holding that the federal courts should adjudicate the merits of the operators' illegality defenses, including their claim that the purchase-of-coal clause violates § 8(e) of the NLRA.

The *Kaiser Steel* case was remanded to the District Court, where it was later consolidated for pre-trial purposes, pursuant to 28 U.S.C. § 1407(a), with other purchase-of-coal cases. Only limited discovery occurred in the consolidated proceedings, however, because the coal operators moved for summary judgment. The operators contended that no discovery was necessary because the language of the clause itself manifested an unlawful secondary purpose. The District Court agreed and, without conducting an inquiry into the purpose of the clause or its application, held it unlawful under 8(e). App. 34a-35a. The Court of Appeals reversed.

D. The Opinion Below

The thrust of the decision by the Court of Appeals is that "the complexity surrounding the primary and secondary dichotomy under § 8(e)" renders this case inappropriate for summary judgment. App. 11a. More specifically, the Court held that the legality of the purchase-of-coal clause depends upon its purpose, which cannot be ascertained from the language itself. App. 11a-12a. Thus, the Court held, in order to determine the purpose of the clause, the trial court must inquire into disputed issues of fact, such as whether the labor costs of the non-union operator are lower than the signatory's by an amount equal to or greater than the amount of the purchase-of-coal contribution. If the purchase-of-coal clause contribution is less than the differential in labor costs between NBCWA and non-NBCWA mines, "then [the non-union operator] has not been put at a competitive disadvantage with coal produced in a union mine." App. 12a. In other words, the imposition of the clause would not put secondary pressures on non-NBCWA operators to organize their mines. Rather, the clause would be serving only to equalize costs and remove the incentive to buy coal mined by operators with lower labor costs, an incentive threatening the jobs of the miners in each signatory mine. App. 12a-14a. In addition, the Court of Appeals held, the fact-finder must determine whether the coal purchased by a signatory company is the kind it has the ability to mine. This factual issue raises "questions * * * about whether traditional work of the bargaining unit is at risk, the criterion that justifies the legality of work preservation rules." App. 13a.

In sum, the Court of Appeals held that the legality of the clause cannot be determined until the relevant facts, applicable to each signatory, are ascertained. App. 16a. As the Court of Appeals pointed out:

> "None of these matters have been resolved on this record. The trustees and the union submitted evidence in the district court that, by and large, the gap between the labor cost of signatories and non-union producers exceeds the amount of the purchased-coal clause exaction. That fact, however, has not been conceded by the signatories nor judicially established. The other variables that we have listed also require development, as they apply in a particular case." App. 14a (footnote omitted).

In the words of the Court of Appeals, "*Kaiser Steel* v. *Mullins* points the way in holding that a signatory may raise the defense of illegality in a suit for contributions by the trustee." App. 16a. Each signatory is entitled to defend the Trustees' suit for contributions on the ground that the clause is unlawful; but this determination requires an inquiry into "whether the clause is valid as a surrogate union standards or work preservation clause, or whether it contravenes § 8(e) as a union signatory clause * * *." App. 17a.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION AND SUMMARY

In their petition, the coal operators seek to have this Court rule on the legality of the purchase-of-coal clause in the National Bituminous Coal Wage Agreements of 1974, 1978 and 1981 before the parties have had an opportunity to develop a factual record reflecting the history of the provision, its purpose and its application in the cases involved in this litigation. The operators contend that the Third Circuit has erred in requiring that such a record must be developed in order for the legality of the clause to be determined. In particular, the operators argue here that (1) the decision of the Third Circuit raises an unsettled issue of national labor policy, Pet. 7-14; (2) the question of the legality of the clause is important to the stability of the coal industry,

Pet. 14-17; and (3) under the principles set forth in the Third Circuit's decision, litigating the legality of the clause will be both difficult and expensive, Pet. 18-20.

None of these contentions argues in favor of review by this Court. First, the holding of the Third Circuit is dictated by the § 8(e) analysis set forth by this Court in *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967), and followed consistently by this Court, most recently in *NLRB* v. *International Longshoremen's Ass'n*, 53 U.S.L.W. 4919 (June 27, 1985) (*"ILA II"*). It raises no new issue of labor policy or law and does not conflict with the decision of any other Court of Appeals.

Second, the issue that petitioners contend is important to the coal industry—the legality of the purchase-of-coal clause—was not reached by the Third Circuit. The Court declined to rule on this issue in the absence of a more fully developed factual record. Consequently, this issue is not ripe for review by this Court.

Finally, even if litigating the legality of the purchase-of-coal clause should prove difficult or expensive, this would not mean that the Third Circuit should have found the clause *per se* unlawful, thus avoiding this expense.

In short, the holding of the Third Circuit—that the legality of the purchase-of-coal clause cannot be resolved without examining the facts—does not warrant review by this Court.

II. THE OPINION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS AND RAISES NO UNSETTLED ISSUES OF NATIONAL LABOR POLICY.

The issue raised in this litigation is whether the purchase-of-coal clause in the National Bituminous Coal Wage Agreements of 1974, 1978 and 1981 violates § 8(e) of the NLRA. Section 8(e) provides in relevant part:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement * * * whereby such employer ceases or refrains or agrees to cease or refrain from * * * dealing in any of the products of any employer, or to cease doing business with any other person * * *."

The Court of Appeals below recognized that this provision "reaches only 'secondary' pressures." App. 8a. In other words, " 'primary' activity, such as work preservation, is not prohibited, even though secondary effects may be present." *Id.* There are, the Court of Appeals further explained,

> "Two well recognized primary provisions [that] have emerged—work preservation and union standards clauses. If the union's objective is to retain work that is traditionally performed by employees represented by the union and also within the contracting employers' power to assign, § 8(e) is not a bar. *NLRB* v. *International Longshoremen's Ass'n, AFL-CIO*, 447 U.S. 490, 504 (1980). So long as the union has no forbidden secondary purpose to affect the employment relations of an outside employer, the agreement is valid even though it adversely affects the employment opportunities of non-represented workers." App. 9a.

In applying this standard, the Court of Appeals explicitly followed the dictates long established by this Court for analyzing collective bargaining agreements under 8(e). *National Woodwork Manufacturers Ass'n* v. *NLRB*, *supra*, 386 U.S. at 612, provides the starting point. There, this Court made clear that, in enacting 8(e), Congress meant to reach only "secondary pressures." *Id.* at 638. The "central aspect" of unlawful secondary activity, this Court observed, is the employment of "pressure tactically directed toward a neutral employer in a labor dispute not his own." *Id.* at 623 (footnote omitted). In contrast, "employees' activity to

pressure their employer to preserve for themselves work traditionally done by them" is primary and lawful, and "§ 8(e) does not prohibit agreements made and maintained for that purpose." *Id.* at 635.[7]

In short, as this Court stressed in *National Woodwork*, legality under § 8(e) turns on "whether, *under all the surrounding circumstances*, the Union's objective was preservation of work for [the primary employer's] employees, or whether the agreements and boycott were tactically calculated to satisfy the union objectives elsewhere * * *." *Id.* at 644 (emphasis added). This is not, as this Court recognized, "a simple test to apply." *Id.* at 645.

This Court has consistently followed the analytical approach to 8(e) cases set forth in *National Woodwork*. *NLRB* v. *International Longshoremen's Association*, *supra*, is the most recent of the § 8(e) cases. There, this Court addressed for the second time the "Rules on Containers," which reserve to longshoremen represented by

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[7] The petitioners would have the Court look back to *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951), a case analyzing § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) (1982). The rule enunciated in *Denver Building Trades* for § 8(b)(4) cases is no different, however, from *National Woodwork*'s § 8(e) analysis. This Court stated in *Denver Building Trades* that "§ 8(b)(4) restricts a labor organization and its agents in the use of economic pressure where an object of [the pressure] is to force an employer or other person to boycott someone else." 341 U.S. at 687. The legality of the strike there at issue, therefore, depended upon whether it had such "a proscribed object." *Id.* Similarly, the Court in *National Woodwork* made clear that the legality of the provision at issue there depended upon whether the objective of the union was work preservation or whether the objective was to put pressure on a neutral employer. *National Woodwork*, *supra*, 386 U.S. at 623, 635. The legality of the provision at issue here too, therefore, depends upon whether it was motivated —in part or in whole—by an unlawful secondary purpose. Thus, there is nothing in *Denver Building Trades* that would suggest any different approach from that followed by the Third Circuit.

the ILA any work, loading or unloading containers owned or leased by shipping companies, that is to be done within 50 miles of port. If an employer violates the Rules, it is liable to pay the ILA $1000 per container in liquidated damages. The question presented in *ILA II* was whether the Rules violate 8(e).

After examining closely the factual record developed by the Administrative Law Judge and the National Labor Relations Board, this Court held that the Rules did not contravene 8(e). The Court concluded that the Rules had a "clear primary objective to preserve work in the face of a threat to jobs." 53 U.S.L.W. at 4924. Further, there was "no evidence of 'any significant ILA interest in the labor relations of the class of employers boycotted by the Rules.'" 53 U.S.L.W. at 4925. This Court stated explicitly that the case was governed by *National Woodwork*, and, applying the analysis set forth there, held the Rules were valid.

The Courts of Appeals, since *National Woodwork*, have consistently based their 8(e) analyses on the propositions set forth above—that 8(e) requires a determination as to whether an agreement has a primary purpose to protect union work or work standards or a secondary purpose to organize non-union labor, and that that determination requires a deliberate factual inquiry. *See, e.g., Sheet Metal Wks. Int'l Ass'n* v. *NLRB*, 498 F.2d 687 (D.C. Cir. 1974); *Carrier Air Conditioning Co.* v. *NLRB*, 547 F.2d 1178, 1181 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977); *A. Duie Pyle, Inc.* v. *NLRB*, 383 F.2d 772, 775-76 (3d Cir. 1967), *cert. denied*, 390 U.S. 905 (1968); *Frito-Lay, Inc.* v. *Retail Clerks Union Local No. 7*, 629 F.2d 653 (10th Cir. 1980).[8]

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[8] There are, as petitioners suggest, Pet. 10, a few cases in which the Courts have found that the language of a clause itself manifested a secondary purpose. This was essentially the holding in *Pacific Northwest Chapter of Associated Builders & Contractors,*

Nevertheless, the petitioners here contend that the Third Circuit erred in declining to hold the purchase-of-coal unlawful under 8(e) on summary judgment, and that this decision raises an "unsettled issue" of national labor policy. The petitioners do not dispute that there has been no factual inquiry made into the purpose of the provision. Rather, they contend that the clause is "[a] 'classic' union signatory clause, which is illegal *per se*," because it "*inhibits* all dealings with non-signatories." Pet. 12 (emphasis in original). The Third Circuit, the petitioners argue, "recognized that the purchased-coal clause requires a signatory to discriminate in its dealings

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Inc. v. *NLRB*, 654 F.2d 1301 (9th Cir. 1981), *aff'd in part sub nom. Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645 (1982), and *Amax Coal Co.* v. *NLRB*, 614 F.2d 872 (3d Cir. 1980), *rev'd on other grounds*, 453 U.S. 322 (1981). The Third Circuit's decision here is consistent with these cases. Thus, the Court recognized that where the language of the " 'clause forces the licensee-employer to abide by the union recognition portion of the contract' " it is a "union signatory clause[]" prohibited by 8(e). App. 10a. In this case, by contrast, the Third Circuit explicitly found that a "prohibited secondary objective [was] not revealed by the language" of the clause. App. 12a. The purchase-of-coal clause does not force signatory operators to purchase coal only from other unionized operators. Rather, the clause on its face requires only that a signatory who purchases coal make the same contribution to the Funds that it would be required to make if it had produced the coal itself. Thus, the Third Circuit correctly concluded that, under *National Woodwork*, the clause could not be determined unlawful on its face.

Petitioners also rely, Pet. 11-12, upon *General Longshore Workers, ILA Local No. 1418 (New Orleans Steamship Ass'n)*, 235 N.L.R.B. 161 (1978), as a case that conflicts with the Third Circuit's ruling. It does not. This was a decision of the NLRB invalidating the imposition of a $2 per ton royalty on cargo loaded or unloaded by non-ILA labor. There, the Board found specifically that the royalty bore no relationship to lost work opportunities by the applicable ILA bargaining unit. In fact, as noted by the Board, the ILA disclaimed any work preservation objective. *Id.* at 167. In any event, the ruling of the Board was based upon an evidentiary hearing—which is what the Third Circuit held was necessary before the legality of the purchase-of-coal clause could be determined.

on the basis of union-status." Pet. 13. Under these circumstances, the petitioners conclude that the Third Circuit adopted a "radically different approach" to 8(e) analysis by remanding the case to the District Court for trial. *Id.*

The Third Circuit, however, did not find that the purchase-of-coal clause "requires a signatory to discriminate in its dealings on the basis of union-status." The whole point of the Third Circuit decision was that such a determination is fact-bound and cannot be made until the factual record is complete. Thus, the Court made clear that the question whether the purchase-of-coal contribution puts a non-NBCWA coal operator at a competitive disadvantage depends, *inter alia*, upon the difference in labor costs between the NBCWA and non-NBCWA mines and whether the contribution approximates that difference. App. 12a-13a. In the Court's words, whether or not the clause discriminates against non-NBCWA companies so as to put pressure on them to organize is a question that "must depend upon individualized fact finding." App. 17a.

In sum, the Court of Appeals holding is consistent with *National Woodwork* and its progeny which require the development and analysis of a factual record before the legality of a provision under 8(e) can be determined. As this Court reflected in *ILA II*, "[t]he various linguistic formulae and evidentiary mechanisms we have employed to describe the primary/secondary distinction are not talismanic nor can they substitute for analysis." 53 U.S.L.W. at 4924. The Third Circuit remanded this case to the District Court so that this analysis can be conducted. Consequently, the decision of the Third Circuit at this stage in the proceedings raises no "unsettled" issues of labor policy for review by this Court.

III. SINCE THE THIRD CIRCUIT DID NOT RULE UPON THE LEGALITY OF THE CLAUSE, REVIEW OF ITS DECISION IS NOT WARRANTED.

In Parts II and III of the petition, the petitioners argue that the lengthy history of this litigation, the importance of the clause in the coal industry, and the potential costs of developing a record support their view that the Third Circuit's decision should be reviewed by this Court. Pet. 15-20. Petitioners outline the history of the litigation over predecessors to the purchase-of-coal clause and suggest that they hoped all the litigation would be resolved by their summary judgment motions. They express their disappointment that "[r]ather than ending the twenty year conflict over the legality of the purchased-coal clause, the Third Circuit's decision can only serve to expand and prolong this controversy for as long as the clause remains in force." Pet. 17. Moreover, the petitioners assert, "the cost of applying [the Third Circuit's decision] will be staggering for the courts and all parties concerned." Pet. 18.

These concerns, however, do not support review of the Third Circuit's ruling by this Court. The Third Circuit concluded that, under settled law, the legality of the purchase-of-coal clause cannot be resolved absent the development of a factual record. The amount of time it will take to develop this record, and the extent of the costs to be incurred, cannot be ascertained now. Whatever that effort may be, however, avoiding it could not justify holding the purchase-of-coal clause unlawful *per se* without abandoning the principles set forth in *National Woodwork* and its progeny.

This case is not in the same posture as *ILA II*. There, the NLRB developed a substantial record which disclosed the history of the Rules at issue, their purpose and their application to the shipping industry. The case was ready for final resolution. Here, there is no comparable record.

Nor is there any comparable decision below on the legality issue.[9]

Furthermore, the facts developed to date indicate that the clause has a lawful primary purpose and was designed to protect the work and work standards of the employees of each signatory employer by eliminating the incentive of the signatory company to subcontract work to employers with inferior working conditions and cheaper labor costs. More particularly, the record shows that there is a significant differential between NBCWA and non-NBCWA labor costs such that the purchase-of-coal clause serves only to equalize those costs; that this differential has persisted throughout the period that the clause has been in effect; and that there are no non-NBCWA coal operators whose labor costs are comparable to the NBCWA.[10] The record further shows that the clause was not intended, and has not been used, as a union organizing device. Consequently, the Trustees believe that when the record is fully developed, they will prevail.

In sum, contrary to the suggestion of petitioners, the development of a record will not be a futile exercise—it is, in fact, the only way to reach the issue petitioners raise, that is, the enforceability of the purchase-of-coal clause. Under the circumstances, the Third Circuit's denial of petitioners' summary judgment motion presents no issue warranting review by this Court.

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[9] The decisions cited by petitioners, Pet. 15, with the exception of *Kaiser Steel Corp.* v. *Mullins*, *supra*, and *Local Union 6046, UMWA (Plateau Coal Sales, Inc.)*, N.L.R.B. Cas. Nos. 9-CC-1161-1-2-3 (filed Feb. 4, 1982), an unresolved NLRB proceeding, all involved predecessors of the purchase-of-coal clause.

[10] See note 6, *supra*.

CONCLUSION

For these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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